



Federal Communications Commission
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DA 08-483

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CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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Re: Application for Assignment of License
KFTA-TV, Fort Smith, Arkansas
(File Nos. BALCT-20060411ABX and
BRCT-20050201ALT; Facility ID No.
29560)
KNWA-TV, Rogers, Arkansas
(File No. BRCT-20050201ALW; Facility ID
No. 29557)

Gentlemen:

This is in regard to the above-referenced application for consent to assign the broadcast television license of Station KFTA-TV, Fort Smith, Arkansas, from Nexstar Broadcasting, Inc. ("Nexstar"), to Mission Broadcasting, Inc. ("Mission"), and the above-referenced applications seeking renewal of the licenses for Station KFTA-TV and Station KNWA-TV, Rogers, Arkansas. Ft. Smith 46, Inc. ("Ft. Smith 46"), filed a Petition to Deny the instant assignment application on May 22, 2006, and supplemented its petition on July 25, 2006.¹ Nexstar and Mission filed a joint Opposition to Petition to Deny on June 6, 2006, to which Ft. Smith 46 filed

¹ Ft. Smith 46 is the licensee of several Class A and low-power television stations serving as Fox affiliates in the same Fort Smith-Fayetteville-Springdale-Rogers, Arkansas Designated Market Area ("Ft. Smith DMA") as Station KFTA-TV. Ft. Smith 46, therefore, has standing to file the Petition to Deny by virtue of its status as a market competitor. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

a Reply on June 16, 2006.² On September 5, 2006, Ft. Smith 46 filed a Petition to Deny the license renewal applications of Station KFTA-TV and commonly owned Station KNWA-TV, raising matters regarding the Nexstar/Mission relationship that are additional to those advanced in the Petition to Deny the Station KFTA-TV assignment. After considering all the pleadings in this case, we grant in part and deny in part the Petition to Deny the instant assignment application, admonish Nexstar for a false certification in violation of Section 1.17(a)(2) of the Commission's rules, and deny the Petition to Deny the license renewal applications.

Background. The Commission granted applications assigning Stations KFTA-TV (formerly KPOM-TV) and KNWA-TV (formerly KFAA(TV)) to Nexstar on December 21, 2004.³ In so doing, the Commission also granted a continuing satellite exception to the local television ownership rule to permit Station KNWA-TV to continue operating as a satellite of Station KFTA-TV,⁴ and denied a petition to deny filed by Ft. Smith 46. Following consummation of the instant transaction, Mission intends to switch Station KFTA-TV's network affiliation from NBC to Fox.⁵ Mission and Nexstar will also enter into a Joint Sales Agreement ("JSA") that will cover the sale of advertising time for Station KFTA-TV and a Shared Services Agreement ("SSA") that will cover technical support, back-office support, and the production of newscasts for Station KFTA-TV. Nexstar and Mission will also hold reciprocal loan guarantees. Draft copies of the JSA and SSA have been submitted along with the assignment application.

Petition to Deny Station KFTA-TV Assignment Application. Ft. Smith 46 argues that the agreements between Nexstar and Mission demonstrate that Mission will not be independent, and, therefore, the Commission should either dismiss the instant application as violating Section 73.3555(b) of the Commission's rules, or designate the application for hearing.⁶ Ft. Smith 46 states, in particular, that the "closely intertwined relationship between Nexstar and Mission goes far beyond the confines of a traditional" JSA, and is similar to previous arrangements the Commission determined implicated the local television ownership rule.⁷ According to its interpretation of the JSA, Mission will sell all of the available commercial time on Station KFTA-TV to Nexstar; Nexstar will be entitled to all advertising revenue; and Nexstar, not

² Nexstar and Mission filed an Opposition to Petition for Leave to File Supplement to Petition to Deny and a Response to Reply on August 14, 2006.

³ Letter from Barbara A. Kreisman, Chief, Video Division, to Nexstar Broadcasting, Inc., dated December 21, 2004.

⁴ See 47 C.F.R. §73.3555, Note 5. Nexstar acknowledges that, without the satellite exception, common ownership of Stations KFTA-TV and KNWA-TV, both of which are located in the Ft. Smith DMA, would violate the local television ownership rule. See 47 C.F.R. §73.3555(b).

⁵ Section 1.2(h) of the Asset Purchase Agreement states that Station KFTA-TV's network affiliation agreement is not to be conveyed as part of the transaction between Mission and Nexstar.

⁶ Ft. Smith 46 also complains that the Commission cannot evaluate the extent of the relationship between Mission and Nexstar because the JSA and SSA submitted with the application are drafts and subject to change until executed. Our conclusions are conditioned upon the final, executed copies being substantially identical to the drafts submitted with the application. We will further require Nexstar and Mission to submit final copies of the JSA and SSA when executed as part of the record in the instant proceeding.

⁷ *Petition to Deny*, at 2.

Mission, will set the rates for advertising sold by Nexstar. Ft. Smith 46 argues that the Commission has tentatively concluded that television JSAs should be attributable and, therefore, the Commission should not rule on the application while the rulemaking remains pending. Ft. Smith 46 states that, pursuant to the SSA, Stations KFTA-TV and KNWA-TV will co-locate their main studio; share non-managerial administrative and/or master control and technical facilities; share grounds keeping, maintenance, security, and other services related to those facilities; and Nexstar will produce news for use on Station KFTA-TV.

Ft. Smith 46 argues that the history of the Nexstar-Mission relationship establishes that Mission “is an alter ego, if not *de facto* subsidiary of Nexstar.”⁸ Ft. Smith 46 cites, in particular, Nexstar’s Security and Exchange Commission (“SEC”) filings. According to Ft. Smith 46, these filings attribute Mission’s revenues and debts to Nexstar; refer to markets in which Mission and Nexstar have stations as “duopoly markets;” state that Nexstar has a “controlling financial interest in Mission for financial reporting purposes;” and state that Nexstar receives “substantially all of the available cash, after debt service costs, generated by the stations [licensed to Mission].”⁹ Ft. Smith 46 notes that Mission owns no stations that are not in Nexstar markets, and asserts that Mission’s sole shareholder and President, David Smith, has demonstrated a poor understanding of Mission’s operations, as evidenced by a newspaper article attached to the Petition to Deny. Ft. Smith 46 alleges that Mission and Nexstar share legal counsel and that, in general, “every outreach to the public will be operated by Nexstar.”¹⁰

In addition to alleging that Nexstar and Mission are not independent, Ft. Smith 46 makes two allegations of misrepresentation. It first contends that Nexstar asserted in 2003 that Station KNWA-TV could not operate as a stand-alone station, and that this assertion was the basis of the Commission’s grant of a satellite exception to the multiple ownership rule in December 2004. Ft. Smith 46 argues that the local market has not changed significantly since grant of the satellite exception, and, therefore, Nexstar must have misrepresented facts in its request for a satellite exception, or is misrepresenting facts now when it argues that station KNWA-TV can operate independently.

Ft. Smith 46 further argues that Mission and Nexstar both misrepresented to the Commission in response to Section II, Question 5, and Section III, Question 7, of the assignment application that neither is a party to a pending application where unresolved character issues had been raised. Ft. Smith 46 states that on January 3, 2006, Cable America Corporation (“Cable America”) filed a petition to deny the license renewal applications for Stations KSFY-TV and KOLR(TV), Springfield, Missouri, licensed to Nexstar and Mission, respectively. The petition alleged that Nexstar exercised *de facto* control over Mission, and also raised allegations of misrepresentation and false certification. Ft. Smith 46 states that these renewal applications

⁸ *Id.* at iii.

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 10. Ft. Smith 46 mentions that, in at least five other markets, Nexstar and Mission have entered into identical Option Agreements. Nexstar and Mission specifically deny entering into an Option Agreement with respect to Station KFTA-TV, however, and Ft. Smith 46 has provided no evidence to the contrary.

remain pending.

Nexstar and Mission respond that Mission has all the indicia of a *bona fide* independent business enterprise. They argue that David Smith makes all the corporate governance decisions, and that Mission further has “three principal officers, a corporate headquarters office..., its own controller to handle corporate financial requirements, and sufficient staff to oversee the core day-to-day operations of its stations.”¹¹ According to Nexstar and Mission, Mission’s full-time Chief Operating Officer, and not David Smith, oversees the day-to-day operations of Mission.

Nexstar and Mission argue that the draft JSA and SSA are virtually identical to agreements that the Commission has approved in connection with past transactions between Nexstar and Mission. They argue that Ft. Smith 46 has not established that Nexstar is or will be programming Mission’s stations, that Nexstar employs or supervises Mission’s employees, and that Nexstar controls Mission’s finances. They argue that Ft. Smith 46 mischaracterizes the draft JSA and SSA. They state that under the draft JSA, Nexstar may collect the revenues attributable to commercial advertisements, but that Mission is entitled to 70% of all such revenues. Citing language in the JSA, they state that Mission, not Nexstar, will set advertising rates. According to Nexstar and Mission, due to the geography of the Ft. Smith DMA, Stations KFTA-TV and KNWA-TV intend to maintain separate main studios, and intend to have separate general managers. While acknowledging that Nexstar will assist in the news production for Station KFTA-TV, they state that the SSA vests ultimate control over the news programming with Mission.

Nexstar and Mission argue that their financial information is consolidated in Nexstar’s SEC filings pursuant to accounting rules, but that fact does not indicate that Nexstar exercises *de facto* control over Mission. Nexstar and Mission point to the “Risk Factors” disclosed in the SEC Form S-4, one of which includes the possibility that Mission may make programming decisions with which Nexstar disagrees. They argue that Nexstar’s SEC filings specifically define “duopoly markets” to include those markets where Nexstar owns, operates, programs or provides sales and other services to more than one station.

With respect to the allegation of misrepresentation involving the 2003 satellite showing, Nexstar and Mission respond they will have constructed full-power digital facilities by mid-August 2006, thus providing Stations KFTA-TV and KNWA-TV with the technological basis to operate as separate, stand-alone stations.¹² They argue that Station KNWA-DT’s signal will be significantly stronger than its analog signal. They also state that they anticipate entering into a reciprocal carriage agreement whereby each station will provide programming to be aired on the other station’s second digital programming stream. In addition to technological changes, they also argue that stand-alone status for Station KNWA-TV is justified since there has been substantial population growth in the northern portion of the local market during the last two years, and that total TV advertising revenues have grown accordingly.

¹¹ *Opposition to Petition to Deny*, at 10.

¹² Pending are applications for licenses to cover existing construction permits for Station KFTA-TV’s and Station KNWA-TV’s digital facilities. See File Nos. BLCDDT-20060912ACY and BLCDDT-20060915ANF.

With respect to Nexstar and Mission's alleged false certifications, they acknowledge that the Commission had not resolved the issues raised by the petition to deny the station KSFY-TV and KOLR(TV) license renewal applications and, therefore, the petition should have been referenced in the assignment application. They contend, however, that the failure to include such references does not indicate an intent to deceive the Commission. Nexstar and Mission state that failure to reference the petition was an oversight since Cable America requested dismissal of the petition on March 31, 2006. They state that they have been candid and forthright in their dealings with the Commission since becoming licensees in 1996 and 1998, respectively.

In its Reply, Ft. Smith 46 cites the reciprocal loan guarantees, distinguishing them from previous guarantees the Commission has approved. Ft. Smith 46 also notes that Nexstar's website commingles all of the Nexstar and Mission stations, without distinguishing which stations are owned by Mission. Ft. Smith 46 further states the opposition raises for the first time each station's plan to duplicate its programming on the second digital channel of the other, which it alleges constitutes both a prohibited reservation of time in violation of Section 73.1150 of the Commission's rules, as well as an attributable local marketing agreement.¹³ Ft. Smith 46 concludes that, if the Commission chooses not to dismiss or designate the application for hearing on the basis of their alleged violation of Section 73.3555(b) of the Commission's rules, it "would be arbitrary and capricious for the Commission to grant the application without at a minimum forbidding any options, restricting the scope of any 'joint services,' and forbidding the use of each station's second digital stream by the other."¹⁴

In response, Nexstar disputes Ft. Smith 46's assertion that Nexstar's corporate website fails to distinguish between Mission and Nexstar stations, and provides printouts from a link entitled "Access Station Information" as support. Nexstar and Mission argue that they do not propose to permit Station KFTA-DT and KNWA-DT to provide programming for each other's analog or primary digital signal. Retransmission of programming broadcast by another station on a station's second DTV channel, according to Nexstar and Mission, does not constitute an impermissible time brokerage agreement, and is consistent with the Commission's determination to permit licensees to use their excess digital capacity for additional services. Nexstar and Mission further argue that their proposed arrangement does not implicate Section 73.1150 of the Commission's rules since the purchase agreement, SSA, and JSA do not grant Nexstar the right to reserve time on Station KFTA-TV for its use, and Nexstar will not be using the analog and primary digital facilities of Station KFTA-TV.¹⁵

Discussion. The Commission applies a two-step analysis to a petition to deny under the public interest standard. The Commission must first determine whether the petition contains

¹³ Reply, at 2.

¹⁴ Reply, at 11-12.

¹⁵ In its supplemental filing, Ft. Smith 46 argues that the DTV build-out plan reinforces the conclusion that Mission and Nexstar are not independent since Nexstar is likely to pay for construction of Station KFTA-TV's digital facilities. We find this argument speculative. We further note that Nexstar, as the current licensee, is responsible for completing construction of station KFTA-TV's digital facilities.

specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.¹⁶ This first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”¹⁷ If a petition meets this first step, the Commission must determine whether, “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a substantial and material question of fact as to whether granting the application would serve the public interest.¹⁸

De Facto Control. Upon review of all the pleadings in this case, we conclude that Ft. Smith 46 has failed to raise a substantial and material question of fact as to whether Mission has ceded *de facto* control of its station to Nexstar. The Commission analyzes *de facto* control issues on a case-by-case basis.¹⁹ In determining whether an entity has *de facto* control of an applicant or a licensee,²⁰ we have traditionally looked beyond legal title and financial interests to determine who holds operational control of the station.²¹ The Commission, in particular, examines the policies governing station programming, personnel, and finances. The Commission has long held that a licensee may delegate day-to-day operations without surrendering *de facto* control, so long as the licensee continues to set the policies governing these three indicia of control.²²

Both the JSA and SSA contain language to the effect that Mission will maintain control over Station KFTA-TV. Section 3 of the SSA states that the “arrangement will not be deemed to give either Party any right to control the policies, operations, management or any other matter relating to the Station operated by the other Party.” Section 8 of the JSA states that “Mission shall continue to maintain full control over the operations of [Station KFTA-TV], including programming, editorial policies, employees of Mission, and Mission-controlled facilities.”

With respect to programming in particular, Section 2(b) of the SSA states that “[e]ach Party will maintain for the Station(s) operated by it separate managerial and other personnel to carry out the selection and procurement of programming for such Station, and in no event will

¹⁶ 47 U.S.C. §309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”).

¹⁷ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”). See also *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (affirming two-step public interest analysis) (“*Serafyn*”).

¹⁸ *Astroline*, 857 F.2d at 1561; 47 U.S.C. §309(e). See also *Gencom, Inc.*, 832 F.2d at 181.

¹⁹ See *Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834, 18843 (2003); *Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

²⁰ Such a finding would result in a violation of Section 310(d) of the Communications Act. 47 U.S.C. § 310(d).

²¹ See *WHDH, Inc.*, 17 F.C.C. 2d 856, 863 (1969), *aff’d sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

²² *WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995); *Choctaw Broadcasting Corp.*, 12 FCC Rcd 8534, 8539 (1997); *Southwest Texas Broadcasting Council*, 85 F.C.C. 2d 713, 715 (1981).

the Parties or the Stations share services, personnel or information pertaining to such matters,” except as relates to the production of news programming. There will be shared responsibility in producing news programming, but Mission will determine the title and format of such newscasts, and Nexstar and Mission will enter into a newscast operating conditions agreement “which will provide the basis for daily operations, contingencies, KFTA-TV’s access to breaking stories, . . . editorial and ratings reviews and guidelines for access by Mission personnel and KFTA-TV customers to Nexstar’s facilities.” Section 8 of the JSA states that Mission “may, in its sole discretion, decline to accept advertising sold by Nexstar, in the event that it reasonably believes that the broadcast of such advertising would violate applicable laws or regulations, would damage Mission’s reputation in the community, or would otherwise be contrary to the public interest.” Considering the various provisions of the JSA and SSA in their entirety, we do not believe that Nexstar will have an impermissible level of influence over Station KFTA-TV’s programming.

With respect to personnel, the SSA provides that Mission will employ a general manager and business manager for Station KFTA-TV, and that these managerial employees will report solely to Mission. The SSA thus complies with the minimum staffing requirements of the main studio rule.²³ Stations KFTA-TV and KNWA-TV will also maintain physically separate main studios. While Nexstar personnel may implement a number of technical and business services, they will at all times be subject to the direction and control of Mission.

With respect to finances, the JSA provides that Mission will receive 70% of all revenue attributable to commercial advertisements, and as noted by Mission and Nexstar in their opposition, Mission will set the rate for the sale of time on the station. We do not believe the statements in Nexstar’s SEC’s filings cited by Ft. Smith 46 are probative of *de facto* control in this instance. The Commission has long held that it is not bound by the definition of “control” used in securities law.²⁴ In any case, as noted by Nexstar and Mission in their opposition, the SEC Form S-4 states that Mission may make programming decisions with which Nexstar disagrees, which does not indicate that Nexstar will hold operational control over Mission.

Ft. Smith 46 has further not provided probative evidence that David Smith and Mission’s Chief Operations Officer fail to exercise operational control over Station KFTA-TV. The article upon which Ft. Smith 46 bases its allegations regarding David Smith is hearsay, and, as such, is not reliable evidence.²⁵ Moreover, it does not address whether Mission’s Chief Operations Officer would fail to exercise operational control over Station KFTA-TV. Ft. Smith 46’s other arguments regarding David Smith’s role are speculative. The Commission has further held that

²³ See *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), *aff’d* 10 FCC Rcd 3759 (1995).

²⁴ *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8519 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996); *Storer Communications, Inc.*, 101 F.C.C.2d 434, 442 (1985).

²⁵ *Pikes Peak Broadcasting Company, Inc.*, 12 FCC Rcd 4626, 4630 (1997). See also *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Rothschild Broadcasting Company, Inc.*, 10 FCC Rcd 7226, 7227 (1995); *Post-Newsweek Stations, Florida, Inc.*, 49 FCC 2d 92 (Rev. Bd. 1974).

the content of websites is irrelevant to determining *de facto* control.²⁶ Although in certain circumstances common counsel can be evidence of control, it is by no means a dispositive factor.²⁷ Ft. Smith 46 has provided no evidence that Nexstar has used the common legal representation to control Mission or station KFTA-TV.²⁸

Attribution. We further find that Ft. Smith 46 has failed to raise a substantial and material question of fact as to whether Nexstar holds an attributable interest in Mission. The Commission's attribution rules seek to identify those interests that confer a degree "of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."²⁹ Shared services agreements covering technical and other back-office operations typically do not raise an issue under the Commission's attribution rules. Likewise, the Commission has previously determined that loan guarantees do not confer an interest upon the guarantor requiring attribution,³⁰ but that, instead, any consideration paid for the guarantee would be considered as part of the calculation under the equity plus debt attribution rule.³¹

The SSA between Mission and Nexstar does, however, state that Nexstar will provide to Station KFTA-TV "live-feed, fully-staffed and produced newscasts....provided that such newscasts will not comprise more than 15% (by duration) of the programming broadcast on KFTA-TV during any broadcast day."³² The SSA thus includes a Local Marketing Agreement ("LMA"). Under the Commission's 1999 *Attribution Order*, LMAs became generally attributable to the brokering station unless the LMA covers no more than 15% of the weekly broadcast hours of the brokered station.³³ The Station KFTA-TV SSA, on its face, appears to comply with the 15% criterion set forth in the 1999 *Attribution Order*.

Ft. Smith 46 argues that the JSA must be considered in combination with the other agreements between Mission and Nexstar, in particular the SSA. In the 1999 *Attribution Order*, the Commission "declin[ed] to impose new rules attributing JSAs as long as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core

²⁶ *Secret Communications II, LLC*, 18 FCC Rcd 9139 (2003). See, also, *Kathryn R. Schmeltzer, Esq.*, 19 FCC Rcd 3897, 3900 (MB 2004).

²⁷ See, e.g., *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8518 (1995), *recon. denied*, 11 FCC Rcd. 7773 (1996).

²⁸ *Compare Poughkeepsie Broadcasting Co., Ltd.*, 5 FCC Rcd 3374, 3377-78 (Rev.Bd.1990), *rev. denied*, 6 FCC Rcd 2497 (1991) (counsel foisted upon an allegedly controlling general partner by allegedly passive limited partners evidence of a sham partnership).

²⁹ *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests ("Attribution Order")*, Report and Order, 14 FCC Rcd 12559 (1999).

³⁰ *Paramount Stations Group of Kerrville, Inc.*, 12 FCC Rcd 6135, 6136-7 (1997).

³¹ See, e.g., *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 16 FCC Rcd 1097, 1112 (2001).

³² Shared Services Agreement at Section 3(f)(i).

³³ *Attribution Order*, 14 FCC Rcd at 12597.

operations of the stations such that they are, in fact, substantively equivalent to LMAs.”³⁴ In the *2002 Ackerley Order*, the Commission concluded that an LMA, JSA, and other related agreements could be substantively equivalent to an LMA in excess of 15% of weekly broadcast hours if the agreements did not provide the licensee with an economic incentive to control the 85% of programming not provided under an LMA.³⁵

In the *2002 Ackerley Order*, however, the licensee received no compensation from advertising revenues, and the broker’s personnel were involved in the selection of programming not to be provided pursuant to the LMA. Furthermore, there was no evidence that station management ever refused a programming suggestion from the broker. As stated above, Mission will receive 70% of all advertising revenues and, with the exception of newscasts, Nexstar personnel will not be involved in the programming to be aired on Station KFTA-TV. The structure of the relationship between Mission and Nexstar is markedly different from that considered in the *2002 Ackerley Order*, and does not support a finding of attribution.

Ft. Smith 46 is correct that the Commission in a recent Notice of Proposed Rulemaking tentatively determined that television JSAs should be attributable interests, but the Commission has yet to reach a formal decision in the rulemaking. Further, it has not reached a decision as to what grandfathering relief for existing television JSAs would be appropriate if television JSAs are deemed to be attributable interests.³⁶ It is, consequently, inappropriate to condition our decision here on the outcome of that proceeding. We further deny Ft. Smith 46’s request to otherwise condition grant on Mission and Nexstar not entering into an option agreement in the future. The impact of such an agreement on the status of the Mission/Nexstar relationship is speculative.

Misrepresentation. Misrepresentation is a false statement of fact made with the intent to deceive the Commission.³⁷ Fraudulent intent can be found from "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity,"³⁸ and can also be derived from motive.³⁹ The Commission may disqualify an applicant who deliberately misrepresents or lacks candor in dealing with the agency.⁴⁰ In addition, Section 1.17(a)(2) of the Commission’s rules prohibits any applicant from providing material factual information that is

³⁴ *Id.* at 12612-12613.

³⁵ *Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828, 10842 (2002) (“*2002 Ackerley Order*”).

³⁶ *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, 19 FCC Rcd 15238, 15239, 15244 (2004).

³⁷ *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

³⁸ *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991), quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).

³⁹ *Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

⁴⁰ See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) (subsequent history omitted).

incorrect without a reasonable basis for believing the information to be correct.⁴¹ The "reasonableness" standard requires no more than that regulatees exercise a degree of diligence reasonable under the circumstances to ensure that statements to the Commission are accurate and not misleading.⁴²

Mission and Nexstar's certifications in response to Section II, Question 5, and Section III, Question 7, of the above-referenced FCC Form 314 application were in fact false. Cable America's January 3, 2006, petition to deny filed against the license renewal applications for Stations KFSX-TV and KOLR(TV) specifically cites character issues, including false certification and misrepresentation. Nexstar should have been aware that, despite Cable America's formal request to withdraw the petition, the license renewal applications remain pending until the Commission reviews the matters alleged to determine whether a grant of the applications will serve the public interest.⁴³ We expect a greater degree of care in representations made to the Commission than was exhibited here.

We do not find, however, based on a review of the record as a whole, that there exists a substantial and material question of fact as to whether Mission and Nexstar intended to deceive the Commission by their false certifications. Ft. Smith 46 has provided no evidence that calls into question Nexstar's explanation that the failure to disclose the petition was an "oversight." A mistake in an application alone, without any indication that the licensee meant to deceive the Commission, does not raise a substantial and material question of fact regarding intentional misrepresentation.⁴⁴ The Commission has further stated that it will not infer intent to deceive merely because an applicant submits false statements in an application on which it wants favorable action.⁴⁵

We conclude, however, that Nexstar's failure to disclose the petition did violate Section 1.17(a) of the Commission's rules. Under the circumstances, it would have been reasonable to expect Nexstar to discover the pending petitions filed against the Station KFSX-TV and KOLR(TV) renewals, do the necessary research of Commission precedent, and disclose the existence of the proceedings in the instant FCC Form 314.

In assessing an appropriate remedy for a violation of our rules, we must take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act,⁴⁶ which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may

⁴¹ 47 C.F.R. §1.17(a)(2).

⁴² *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016, 4021 (2003).

⁴³ *Twentieth Holdings Corporation*, 4 FCC Rcd 4052 (1989); *Booth American Co.*, 58 FCC 2d 553, 554 (1976).

⁴⁴ *High Country Communications*, 4 FCC Rcd 6237, 6238 (1989).

⁴⁵ See, e.g., *Hispanic Broadcast System, Inc.*, 16 FCC Rcd 8072, 8074 (2001); *Joseph W. Bollinger and Donna M. Bollinger*, 16 FCC Rcd 18107 (2001).

⁴⁶ 47 U.S.C. § 503(b)(2)(D).

require. The violation here appears to be an isolated occurrence, so while a misunderstanding of our rules does not excuse the violation,⁴⁷ in exercising our discretion under Section 503(b)(2)(D) of the Act, we conclude that a monetary forfeiture would not be the appropriate remedy. We will instead admonish Mission and Nexstar for their false certifications.

With respect to Nexstar's 2003 satellite showing, even were we to conclude that it was erroneous, Ft. Smith 46 has provided no evidence that Nexstar intended to deceive the Commission. Nexstar has stated that it was unfamiliar with the stations and the market at the time, and had to rely on the seller for financial information. Mission and Nexstar have provided the reasons for why they now believe the Ft. Smith DMA can now support Stations KNWA-TV and KFTA-TV as independent, stand-alone stations. Because Mission is not requesting a satellite exception here, we need not evaluate the sufficiency of this showing.

Reciprocal Carriage Agreement. Nexstar and Mission state in the Opposition to Petition to Deny that they "anticipate entering into a reciprocal agreement to permit each of their respective DTV stations to carry the signal of the other station on the station's second DTV programming stream,"⁴⁸ arguing that such an agreement is consistent with the Commission's decision to permit licensees to offer ancillary and supplementary services on multicast digital channels.⁴⁹

We note that the Commission has yet to determine whether such an agreement would be subject to the Commission's attribution standards relating to LMAs. To the extent that the agreement is either a condition of, or consideration for, the proposed transaction, we also note that it would appear to violate the plain language of Section 73.1150(a) of the Commission's rules, which states that "[i]n transferring a broadcast station, the licensee...may not reserve the right to use the facilities of the station for any period whatsoever."⁵⁰ We will thus prohibit Nexstar and Mission from entering into such an agreement, and, to the extent the parties have already entered into such an agreement, we will require that it be dissolved.

Petition to Deny License Renewal Applications. On August 29, 2006, Nexstar notified the Commission that it had entered into a pre-closing Time Brokerage Agreement ("TBA") with Mission. Under the agreement, Mission provides Fox Network programming on Station KFTA-TV, and pays Nexstar \$5,000 per month for the time periods during which Fox Network programming will be aired on the station. Nexstar pays Mission \$20,000 for the right to sell the advertising for the time periods covered by the TBA. The TBA will expire upon consummation

⁴⁷ Section 503(b)(1) of the Act states that any person who is determined by the Commission to have *willfully* or *repeatedly* failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty. 47 U.S.C. § 503(b)(1). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1).

⁴⁸ *Opposition to Petition to Deny*, at 4.

⁴⁹ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12821 (1997), *recon. denied*, 13 FCC Rcd 6860 (1998).

⁵⁰ 47 C.F.R. § 73.1150(a).

of the instant transaction.

In its Petition to Deny the license renewal applications for Stations KFTA-TV and KNWA-TV,⁵¹ Ft. Smith 46 argues that, as a result of the TBA, Station KNWA-TV no longer qualifies for the satellite exception. Ft. Smith acknowledges that Note 5 to Section 73.3555 permits satellite stations to evolve into full-service stations without requiring divestiture, but argues that Note 5 is limited to those situations where grant of a satellite exception will encourage diversity, localism and the provision of a full complement of network signals. Ft. Smith 46 states that the TBA will result in the removal of NBC programming in areas served by Station KFTA-TV, and will not result in new network service. Ft. Smith further states that the stations' City Grade contours will overlap once digital operations commence. Ft. Smith 46 also contends that the TBA is "suspect" because it results in a "net cash flow of \$15,000 per month in Mission's favor."⁵² It asks that the Commission not renew the above-captioned stations' licenses until Station KNWA-TV is returned to satellite status, and that the Commission undertake appropriate enforcement action.

Nexstar argues that Ft. Smith 46's request is inconsistent with the Commission's decision not to limit local program origination by satellites in order to "encourage such separately-originated programming on stations that had been entirely satellite stations previously."⁵³ Nexstar states that, in addition to Fox programming provided by Mission, it has begun providing separate newscasts on Station KFTA-TV, which has resulted in an additional 5.4 hours per week of locally-originated programming, and further that it now broadcasts three weekly programs focusing on the Dallas Cowboys football team that are not broadcast on Station KNWA-TV.

The TBA does not violate any Commission rule or policy. Pursuant to *Television Satellite Stations*, satellite stations are distinguished from full-service stations on the basis of economic considerations and not local program origination, in part to encourage the production of more locally originated programming.⁵⁴ The Commission has long encouraged satellites to develop full-service operations and, therefore, Note 5 to Section 73.3555 of the Commission's rules permits stations to evolve from satellite to non-satellite operations without requiring divestiture.⁵⁵ To interpret the provision as Ft. Smith 46 requests would run afoul of Note 4 to Section 73.3555, which prohibits the Commission from requiring the divestiture of existing facilities absent the filing of certain applications.⁵⁶ Rather, the Commission evaluates whether satellite status is warranted under the standards set forth in *Television Satellite Stations* at the

⁵¹ The Petition to Deny was filed after the filing deadline and, therefore, will be considered as an informal objection pursuant to Section 73.3587 of the Commission's rules.

⁵² *Petition to Deny*, at 4.

⁵³ *Opposition to Petition to Deny*, at ii.

⁵⁴ *Television Satellite Stations*, 6 FCC Rcd at 4212, 4215.

⁵⁵ 47 C.F.R. §73.3555, Note 5.

⁵⁶ 47 C.F.R. §73.3555, Note 4.

time of transfer or assignment.⁵⁷

The Commission has determined that, at the time Stations KFTA-TV and KNWA-TV were assigned, Nexstar was entitled to a continuing satellite exception. Ft. Smith 46 has provided no evidence that there was relevant contour overlap between Stations KFTA-TV and KNWA-TV at the time Nexstar filed the applications to acquire the stations.⁵⁸ While the TBA will result in a net cash flow of \$15,000 per month to Mission, Ft. Smith has failed to show how the terms of the TBA violate any Commission rule or policy or would be otherwise inconsistent with the public interest.

Accordingly, **IT IS ORDERED**, That the Petition to Deny filed by Ft. Smith 46, Inc., against the above-reference assignment application **IS GRANTED IN PART**, and denied in all other respects, and that the Petition to Deny the above-captioned license renewal applications **IS DENIED. IT IS FURTHER ORDERED**, That Mission Broadcasting, Inc., and Nexstar Broadcasting, Inc., are hereby **ADMONISHED** for their false certifications in response to Section II, Question 5, and Section III, Item 7 of the above-referenced assignment application, in violation of Section 1.17(a)(2) of the Commission's rules; and That copies of this letter shall be sent by Certified Mail, Return Receipt Requested, to Howard M. Liberman, Esq., Drinker Biddle & Reath LLP, 1500 K Street, N.W., Suite 1100, Washington, D.C. 20005, counsel for Mission Broadcasting, Inc., and Nexstar Broadcasting, Inc.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

⁵⁷ *Television Satellite Stations*, 6 FCC Rcd at 4215-4216. The Commission stated that applicants seeking to transfer or assign a television satellite station are entitled to a "presumptive" exemption from Section 73.3555(b) of the Commission's rules if the parent/satellite combination meets three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. *Id.* at 4213-4214. If an applicant cannot qualify for the presumption, the Commission will evaluate the proposal on an *ad hoc* basis, and grant the application if there are compelling circumstances that warrant approval. *Id.*

⁵⁸ In its opposition, Nexstar argues that it entered into the TBA with Mission after June 1, 2005, the date the previous license term expired, and, therefore, the allegations should not be considered in reviewing the instant license renewal applications. In this case, while we are denying the petition because we find that the TBA does not violate Section 73.3555 of the Commission's rules, we need not determine here whether grant of the license renewal applications would be consistent with Section 309(k)(1) of the Act. 47 U.S.C. §309(k)(1).